



POLICE DEPARTMENT

June 6, 2011

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Felix Rosario
Tax Registry No. 907207
Patrol Borough Manhattan North Task Force
Disciplinary Case No. 85532/09

The above-named member of the Department appeared before me on February 11, 2011, charged with the following:

1. Said Sergeant Felix Rosario, while assigned to Manhattan North Task Force, on or about January 27, 2009, in Bronx County, New York failed and neglected to maintain contact with his subordinates on assignment via radio communications, to wit: said Sergeant Rosario upon being disconnected during a cell phone conversation with Police Officer Frantz Jean-Bart, Sergeant Rosario failed and neglected to re-establish contact via central radio dispatch in a timely manner. (*As amended*)

P.G. 202-17, Page 1, Paragraph 1 – PATROL SUPERVISOR, DUTIES AND RESPONSIBILITIES

2. Said Sergeant Felix Rosario, while assigned to Manhattan North Task Force, on or about January 27, 2009, in Bronx County, New York, did wrongfully and without just cause fail to supervise Police Officer Frantz Jean-Bart and Police Officer David Medrano, to wit: said Officers were involved in a vehicular pursuit that extended outside of the city limits and said Sergeant failed to terminate said pursuit when necessary.

P.G. 202-17, Page 1, Paragraph 1 – PATROL SUPERVISOR, DUTIES AND RESPONSIBILITIES

P.G. 212-39, Page 2, Paragraph 10 – COMMAND OPERATIONS VEHICLE PURSUITS

The Department was represented by Javier Seymore, Esq. Department Advocate's Office, and the Respondent was represented by John D'Alessandro, Esq.

COURTESY • PROFESSIONALISM • RESPECT

The Respondent, through his counsel, entered a plea of Not Guilty to Specification No 1 The Department made a motion to dismiss Specification No 2 A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review

DECISION

The Respondent is found Not Guilty of Specification No 1 The Department's motion to dismiss Specification No 2 is granted

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer David Medrano, Police Officer Frantz Jean-Bart and Sergeant Kevin Gildea as witnesses

Police Officer David Medrano

Medrano is a six-year member of the Department currently assigned to the Manhattan North Task Force On January 27, 2009, he was working with a partner, - - - Medrano and Jean-Bart were on patrol in uniform and in an unmarked vehicle Medrano was the operator Medrano stated that, on that date, they were assigned to the confines of the 33 and 34 precincts to look for stolen vehicles

At one point, they became involved in a pursuit of a black Acura when Medrano noticed that the vehicle did not have registration and inspection stickers affixed to the

windshield After they checked the license plate they discovered that it was for a different vehicle At that point, Medrano believed that the vehicle was stolen Medrano activated his vehicle's siren and light bar. The vehicle, which Medrano had first observed by 183 Street and Amsterdam Avenue, kept

Medrano stated that once the pursuit began, Jean-Bart attempted to reach the Communications Division ("Central Dispatch") on his radio Medrano pointed out that, at some point during the pursuit, Jean-Bart "was trying to get hold of [the Respondent] He wanted to advise him of what officers were following the vehicle " Medrano pointed out that if he were performing a routine stop of the vehicle, he would not have called the Respondent Medrano explained that he and his partner had radios—Medrano's radio was set to the Citywide One frequency and his partner's radio was set to the Division (33/34 precincts) frequency Medrano did not attempt to get on his portable radio to contact the Respondent because that would require him to take his hand off the wheel, which would "have made the pursuit unsafe " He stated that as the recorder, his partner handled the radio and was not able to make radio contact with Central Dispatch using the Division frequency

Medrano was then able to reach the Respondent on his cell phone The call lasted "a couple of seconds" and after the conversation was over they were still following the vehicle into the Bronx attempting to pull it over From the Bronx, they continued to pursue the vehicle on I-95 into Westchester County When they entered Westchester, the Acura struck another vehicle

¹ It should be noted that Medrano pled guilty to failing to notify Central Dispatch during the pursuit, as well as engaging in a vehicle pursuit over a traffic violation

and Medrano could not avoid striking the other vehicle when it fishtailed on the highway. Medrano pulled over and the Acura continued on its way without being stopped. After the accident, Medrano stated that his partner made another phone call but he did not know who he spoke to.

Approximately 10 minutes after the accident, Medrano saw that the Respondent had arrived at the scene. Medrano remembered the Respondent asking if they were all right but he did not recall anything else that was said.

On cross-

was working in Auto Crime for approximately a year and a half and it was normal for him to drive around looking for people who were involved in stealing cars. If he saw suspicious activity he would notify other members of his team using a cell phone. He further acknowledged that a cell phone was the primary means of communication between team members and his supervisor, Citywide radio was seldom used. The reason for not using the radio is for safety reasons—to keep the airwaves clear for more serious matters like an officer who may be wounded. Medrano stated that he received charges and pled guilty to failing to notify Central Dispatch that he was involved in a vehicle pursuit and to engaging in a vehicle pursuit over a traffic infraction. He also stated that his partner believed that he was successful in putting over the radio that they were in a pursuit, but information about the pursuit was never told to the Respondent. Medrano believed that his partner told the Respondent, on the cell phone, that they were following a car.

Medrano stated that the pursuit lasted approximately 15 to 20 minutes and during that time the Department did not know what was going on. When they established

contact with the Respondent it was to tell him they were involved in an accident and he arrived minutes later Medrano stated that after the Respondent asked how they were, he then was angry at them for not putting over the radio that they were in a pursuit because the Respondent had no knowledge of it

On re-direct examination, Medrano stated that the proper procedure to follow during the pursuit was "We should have come over the radio and advised Central that we were engaged in a vehicle pursuit "

Police Officer Frantz Jean-Bart

Jean-Bart is an 11-year member of the Department currently assigned to the Auto Crime Division He was partnered with Medrano on January 27, 2009, searching for possible stolen cars Medrano was the operator and he was the recorder Jean-Bart gave the same facts as Medrano as to what led them in pursuit of what they believed was a stolen vehicle

He stated that he was equipped with a typical Department radio Once the pursuit began he transmitted over the "Citywide One, onto Division [frequency] and [he] tried to relay that [he was] engaging—trying to stop this vehicle to Central, however, Central was conducting a warrant check and they weren't listening to what [he] was trying to [u]tilizing [his] cell phone " He was able to reach the Respondent on the Respondent's personal cell phone and "informed him that [they] were following the vehicle that refused to stop and [their] location " - - - - - him He then tried, on his radio, the Citywide Two frequency to call Central and put over

his location and that they were following a vehicle. He stated that he did not try to reach the Respondent again because he was "engaged in trying to stop a vehicle that [he] suspected is in the middle of committing a crime" and he was concerned with apprehending the individuals. Since they get officers from a Bronx command to assist them but to no avail.

Jean-Bart also testified, as Medrano did, that they had a vehicle accident in Westchester County that was caused by the car they were chasing. The Respondent arrived at the scene and was upset "that we got into a vehicle accident[,] of our situation, but that was about it." He stated that he pled guilty to charges he received for his involvement in the pursuit and for failure to utilize the radio properly.

On cross-examination, Jean-Bart testified that when he sees a situation while on patrol that might be a crime he notifies other members of his team and his supervisor. He acknowledged that the typical means of communication is the cell phone. He further acknowledged that the reason for using the cell phones is that every suspicious situation is not always criminal activity and to use the radio that often would clog up the airwaves. He stated that he still uses the cell phone as the primary means of communication when on patrol. He agreed that communication by cell phone can consist of informing his team and supervisor of a change in location or direction and to further inform them in which direction the team should approach. He stated that it would "be difficult" to do his job if he did not communicate that way.

On the day of the incident, when Jean-Bart called the Respondent, he told the Respondent that he was following the car—not pursuing it—and that the vehicle refused to stop. Jean-Bart stated that the Respondent asked him where he was and he told him

the direction that he was heading in. He then heard the Respondent say he was on his way to Jean-Bart's location. He then lost contact with the Respondent because the call was "dropped." Jean-Bart stated that he did not know if the Respondent heard him say that the car would not stop because the call could have been dropped while he was giving him that information. He stated that he also radioed over the Citywide frequency in the hope that precincts would send help.

Jean-Bart stated that the entire incident—from the first time they saw the car until the accident—took approximately 20 to 25 minutes.

Sergeant Kevin Gildea

Gildea is a 15 ½ year member of the Department currently assigned to the Auto Crime Division. Prior to that command he was assigned to the Internal Affairs Bureau (IAB). While at IAB he was assigned the investigation of the Respondent's case which "involved a vehicle pursuit."

As part of his investigation he reviewed communications of Citywide One and Two and found that there were no communications involving the officers in this case—the Respondent, Medrano and Jean-Bart. He pointed out that, to his knowledge, the Respondent did not use the radio that night. He further stated that the Respondent "[s]hould have had radio contact"

On cross-examination, Gildea testified that when he is on Auto Crime patrol it is not unusual to follow individuals for periods of time, oftentimes this does not lead to a discovery of a crime or arrest.

and team members could either be by cell phone or by radio. He acknowledged that the means of communication can vary "[d]epending on the situation."

During the balance of his testimony, Gildea stated that his investigation revealed there were two cell phone calls made: one by Jean-Bart to the Respondent that lasted approximately 36 seconds, and another at the time of the accident. There were no other communications made by the officers or by the Respondent. When asked how much time there was between the two cell phone calls, Gildea stated that the incident, the vehicle pursuit, was approximately 10 minutes long.

Gildea believed that there should have been some sort of communication between the Respondent and the officers via the radio. When asked if he could point to a provision in the Patrol Guide that requires using the radio under these conditions, Gildea replied, "I couldn't tell you."

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent is a 17-year member of the New York City Police Department, assigned to the Manhattan North Task Force. He had worked in Auto Theft for approximately eight years, two of those as a supervisor. He described a typical day in combating auto crime as focusing on crimes in the street including car thefts. He stated that if they see something about a car that looks suspicious—tail lights that do not match the car they are on—they follow it and check it on their

computers, if it checks out then they let it go. He stated that 95 percent of the time there is no crime being committed.

His team is broken down to no more than two to three officers in a car. During their tour it would be impossible for him to maintain constant contact with his entire team. He would usually contact them at some point later in the tour to see if anything was going on. If nothing is going on then he would change the zone they are patrolling.

When one of his team members sees something suspicious they call him on his cell phone. If it is a "straight follow" and he thinks it's good, then we'll get the whole team in the same area to do a safe to follow the car until we feel we can pull it over with numbers. Safe meaning not a lot of civilians in the street. If the car is stolen, then let's let our numbers overwhelm his. I don't want this to turn into a pursuit. If the car is stolen then "we have to put it over the air" that means going over a division radio and communicating with the Dispatch. He stated that he does not go on the radio for every car that he may be following because that would "clog up that radio" there could be a cop somewhere in the projects, in a building, a domestic somewhere that really needs help. I don't want anybody to try to race to my follow for a car with no registration sticker to hurt himself or hurt somebody by having a car accident. He added that every place that he has worked at has operated the same way and they "still do it to this day."

The Respondent was asked what would take place when one of his officers calls on a cell phone telling him they are following somebody and the call gets "dropped." He replied that either he would try to reach the officer or the officer would attempt to reach him again if he was really needed. The Respondent would also go to the area from where

the officer told him he was following the car. He also stated that if he thought the situation was a stolen car, he would call the other members of the team to respond. He added, "If the car is stolen, I'm going over the radio. If I know my guy is definitely following a stolen car." The radio he is referring to is a Division radio which is a "handheld radio and it has different channels on it. You turn the knob and you can get 33/34 [precincts] for example, or you turn it and get the 23/20 and so on and so forth."

The Respondent pointed out that for just following a car they do not put that over the radio because they do not want to clog up the radio airwaves. They must be actually convinced that the car they are following is stolen before they will use the radio. This reasoning by _____ in _____ progress. If the event is put over the radio then "[e]verybody is going to be trying to get. It's going to get too intense. Somebody might get hurt." The Respondent stated that since he has been doing this type of police work, no one has told him that it was misconduct to communicate with members of his team via his cell phone.

The Respondent testified that at one point on January 27, 2009, he was driving an unmarked car with Officer Jason Landusky when he received a phone call from Jean-Bart telling him that he was following a car. Jean-Bart's voice "[came] over shaky" and when the Respondent asked where he was, he was told "on 181 Street Bridge heading toward the Cross Bronx." When the Respondent was about to ask what kind of car and other particulars of what was taking place, the call went dead. The Respondent then headed towards the 181 Street Bridge.

The Respondent stated that this type of situation, where a cell phone hits a dead spot, happens "a lot" in the 33/34 precincts. He also stated that his team members calling

him and saying that they were following a car "happens every day, every day "

As the Respondent was driving to the 181 Street Bridge he told Landusky, who was the recorder, to call Jean-Bart. When Landusky reached Jean-Bart, the Respondent heard Jean-Bart say that he "crashed ". The Respondent asked Landusky to determine where they were and was told Exit 18B, which is in Westchester County. The Respondent stated that he was in disbelief and when he arrived at their location he saw his officers' car and a civilian car on the side of the road. He then went to everybody to determine if they were all right.

The Respondent stated that from the time he received the first call to the time he learned of the crash from the second call, approximately 10 to 15 minutes had passed. During that time, he had not heard over the Citywide radio that his officers were in a pursuit. He stated that he disagreed with the allegation that he should have called his officers on the radio because "[i]f I would have gotten on the radio, and it's a regular follow like he told me it was, I felt like I was going to endanger other guys going, hey, you know, what's going on? And I was going to clog up the radio for that, for a follow "

On cross-examination, the Respondent stated that both he and Landusky had radios in the car. On a typical day he would only use the radio for an "emergency ". Other than an emergency, he would use the radio to change their zone of patrol or if he needed his team to meet him at a location. He added that he could have used the radio to determine where Jean-Bart and Medrano were. The Respondent stated that he could not have called off the pursuit on the radio because the officers did not use the radio to inform him of the pursuit. If he had decided to use the radio, he could have found out what was going on and has done so in the past.

When Jean-Bart's phone call was dropped, the Respondent believed that the officers were involved in following a car. The Respondent stated that he did not hear anything over the phone that led him to believe that the officers were in pursuit of a vehicle. He remembered Jean-Bart saying "[Sarge], I'm following a car" and the Respondent asking where he was and Jean-Bart saying that he was headed towards the Cross Bronx Expressway. Then, as he previously testified, the call went dead and he headed in the direction of his officers. He also was not concerned about the lapse of 10 minutes between the first and second cell phone calls because a lot of calls he has received regarding "follows" lead to "drops," meaning that they turn out to be terms of criminal activity. He indicated that this happened 95 percent of the time. He therefore, in this case, did not think the officers were in danger or in pursuit of a vehicle.

He stated that he knew Jean-Bart and in the past if he was in a pursuit, that would have been "the first thing [Jean-Bart] would have told me, we're in pursuit of a 16 car. You know, that's our business. That's what we do. That's a different story." He stated that the reason he called Jean-Bart back was because they were short-handed that night and "[i]t's better to stay in the general direction where he told me. It's better to stay close, just in case. I wouldn't want to be on the other side of the [redacted] if that really does happen and now I have to fly over to where Jean-Bart is, so I'll stay in the general area."

The Respondent further explained that the cell phone is "how we communicate to this day. That is how we still do it. We even have a surveillance unit on this job, they do it that way. I took the three-day course. That is how we communicate. It's faster."

When asked if the vehicle pursuit could have been better handled on the Respondent's part if he would have raised the officers on the radio, he stated

No sir I had no idea these guys were in a pursuit that went from Manhattan into Westchester in a matter of minutes How could I have known? He didn't even come over the radio So if you're saying radio the radio is an urgent thing, Jean-Bart would have went over Division [frequency] Why go to Citywide One? Go over Division where I am, then I could hear Jean-Bart, and of course, I hear Jean-Bart's voice over that radio, I'm going to call that pursuit off

When Landusky reached Jean-Bart on the cell phone, the Respondent figured he had contact with him and at that point he was not going to also go over the radio At that point, the Respondent was told they were in an accident

When the Respondent was asked if he thought to use the radio after the cell phone call was dropped, he replied, "It happened very fast I know we're saying here ten minutes, but out there it happened very fast As I'm driving and Landusky was trying to get hold of him, it did not occur to me to get on the radio because I had full confidence that he was going to get in contact with Jean-Bart." He was then asked if it was a concern that after hearing that his officers were involved in following a vehicle, the call was dropped He replied, "Like I said, follows are done every day If my guy calls me and tells me he's on a follow, usually by the time I'll reach out to him or get to him, the follow is done We dropped it. A follow is just that. It's sort of like a little investigation in the street a pursuit is a different thing "

On re-direct examination, he stated that a follow could take five minutes or 25 minutes He stated that he was once on a two-hour follow and that "it's impossible" to maintain constant communication with his team during that time

Specification No. 2

The Respondent is charged with wrongfully failing to supervise Police Officers Jean-Bart and Medrano in that he failed to terminate a vehicle pursuit they were involved in that extended outside city limits

The Department amended the charges against the Respondent on December 1, 2010, and as part of their amendment they opted not to go forward and support this specification. The Department's explanation for dismissing this charge, as seen below, is that the Respondent did not know about the vehicle pursuit because he did not use the radio to contact his team and therefore was not advised that a pursuit was in progress. As such, Specification No. 2 is Dismissed.

Specification No. 1

The Respondent is charged with failing to maintain contact with Officer Jean-Bart by --- = contact with him via the central radio dispatch in a timely manner after they were disconnected during a cell phone conversation. The Department made it clear in closing arguments that the Respondent was not responsible for calling off the pursuit in this situation because he did not have knowledge of the pursuit. The position of the Department is that had the Respondent contacted his team via the radio he would have known that they were in pursuit and he would have been in a position to call it off. It is the lack of radio contact that is the basis for this charge.

The Respondent was the direct supervisor of a team of officers on Auto Crime patrol on January 27, 2009. Officers Jean-Bart and Medrano were members of his team.

in an unmarked car looking for stolen automobiles in the 33 and 34 precincts. The Respondent was the driver in another unmarked vehicle and Officer Landusky was his partner.

The Respondent gave a forthright explanation of the procedures that he and his team adhere to with regard to communicating with each other while on patrol. He left little doubt that the primary means of communication between team members is the cell phone. He testified that this form of communication is generally used for routine communications such as members following autos to determine if there is a crime in progress. The use of cell phones keeps the Division radio clear for much more serious matters such as life and death situations of fellow officers.

When one of the Respondent's team members sees something suspicious, they call him on his cell phone. As he explained it, if it is a "straight follow" and he thinks it is a possible stolen vehicle then the whole team will be called to the area to do a safe follow of the car until they can pull it over in an area with little to no civilians on the street. If the car is stolen, however, he adamantly pointed out that "we have to put it over the air" that means going over a division radio and communicating with the Dispatch. He also pointed out that the reason he does not go on the radio for every car that he may be following is because it will "clog up that radio" there could be a cop somewhere in the projects, in a building, a domestic somewhere that really needs help. I don't want anybody to try to race to my follow for a car with no registration sticker to hurt himself or hurt somebody by having a car accident. He added that every place that he has worked at has operated the same way and they "still do it to this day."

On January 27, 2009, Medrano and Jean-Bart came upon an Acura that did not have registration and inspection stickers affixed to the windshield. Once they checked the license plate, they discovered that it was for a different vehicle. At that point they believed the vehicle was stolen and they turned on their vehicle lights to stop the car. The Acura kept on going and they were in pursuit.

Medrano stated that the proper procedure to follow during the pursuit was to go on the radio and advise Central that they were engaged in a vehicle pursuit. Once the pursuit began, Jean-Bart did just that. He tried to transmit over the Division frequency to Central Dispatch that they were engaged in a pursuit, but, according to Jean-Bart, Central was conducting a warrant check and they were not listening to his transmission. At that point, he contacted the Respondent using his cell phone. When Jean-Bart called the Respondent, he informed him that they were following a vehicle and also gave him their location. He did not tell the Respondent that he was pursuing the vehicle. He then lost contact with the Respondent because the call was "dropped" and Jean-Bart then tried to reach Central on the Citywide Two frequency to put over his location and that they were following a vehicle. He stated that he did not try to reach the Respondent again because he was "engaged in trying to stop a vehicle that [he] suspected is in the middle of committing a crime." He did attempt to get officers from a Bronx command to assist them, but to no avail.

Jean-Bart candidly informed this Court that the typical means of communication is the cell phone because every suspicious situation is not always criminal activity and to use the radio that often would clog up the airwaves. He still uses the cell phone as the

primary means of communication when on patrol. He stated that it would "be difficult" to do his job if he did not communicate that way.

When Jean-Bart's phone call was dropped, the Respondent believed that the officers were involved in following a car. He stated that he did not hear anything over the phone to lead him to believe that the officers were in pursuit of a vehicle. While he did not hear from the officers until approximately 10 minutes later when they informed him of their "crash," he was not concerned about the lapse of time because a lot of calls he has received regarding "follows" lead to drops, meaning that, in his experience, 95 percent of the time the follows turn out to be nothing in terms of criminal activity. This experience, therefore, led him to reasonably believe that the officers were not in danger or in pursuit of a vehicle.

The Respondent, in hindsight, did not believe that the situation could have been better handled on his part by using the radio to reach the officers because he did not know they were in a pursuit in that short period of time. He explained that "the radio is an urgent thing, Jean-Bart would have went over Division [frequency]. Why go to Citywide One? Go over Division where I am, then I could hear Jean-Bart, and of course, I hear Jean-Bart's voice over that radio, I'm going to call that pursuit off."

The Court finds that the Respondent acted according to procedures that are commonly followed on the type of patrol that he and his officers were conducting. He and his officers use the cell phone because it is the easiest and most direct form of communication. It has been a successful tool in the past and is frequently used, especially in 95 percent of the situations - . - . - . activity. It should also be noted that there was no evidence presented to indicate that cell phone use, in this

case, was not authorized as a tool for communication while on duty² The radio, in contrast, has a wider range and serves many functions One important function of the radio is to direct help to an officer in trouble No one can argue that an officer in trouble takes priority over following a suspicious auto that routinely leads to non-criminal activity.

The Respondent made a judgment call, in a rather short period of time, to not use the radio for what he believed was a routine follow of a car Through the perfect vision of hindsight, if he had reached his officers by radio, he may have been able to call off the pursuit in time to prevent the crash This conclusion, however, cannot be accepted as a certainty because there would have to be a determination of what the permissible time he

- - -
thwart the accident

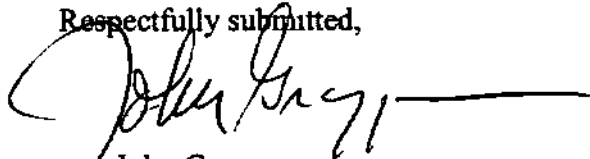
Instead of using the radio to contact the officers, the Respondent opted to go to the location where they said they were and to continue to call them on the cell phone His decision was based on information he was given, at the time, by members of his team and was also in consideration of the safety of his fellow officers who might need assistance This judgment call should not be considered misconduct, especially since it has been used successfully on many occasions of this nature The Respondent combined

² This Court reviewed Patrol Guide section 203-06, effective April 10, 2009, which prohibited "[w]earing or carrying an unauthorized cellular telephone while on duty," but noted in its revision of March 12, 2010, that "[a] cellular phone is authorized to be used by members of the service when conducting official Department related business " Since the incident charged occurred on January 27, 2009, the original prohibition does not apply It should also be noted that the Respondent was not charged with unauthorized use of a cell phone

the facts he was given with his experience and he made a decision For that, he should not be punished

Based on the foregoing, the Respondent is found Not Guilty

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Grappone", followed by a horizontal line.

John Grappone
Assistant Deputy Commissioner-Trials

APPROVED

A handwritten signature in black ink, appearing to read "Raymond W. Kelly", written over a date stamp and the printed name of the Police Commissioner.

NOV 23 2011
RAYMOND W KELLY
POLICE COMMISSIONER